Supreme Court, U.S.
FILED
JUN 28 2001
CLERK

No. 00-758

IN THE

Supreme Court of the United States

UNITED STATES POSTAL SERVICE,
Petitioner,

v.

MARIA A. GREGORY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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BRIEF OF *AMICUS CURIAE* AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, IN SUPPORT OF THE RESPONDENT, MARIA A. GREGORY

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QUESTION PRESENTED

1. Whether a federal agency may use prior disciplinary actions that are the subject of pending grievance proceedings as a significant or primary basis for disciplining or removing an employee for misconduct pursuant to the Civil Service Reform Act of 1978, 5 U.S.C. §1101 *et seq.*

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PRELIMINARY STATEMENT

Pursuant to Supreme Court Rule 37, written consent of the parties having been obtained in writing and filed with this brief, the American Federation of Government Employees, AFL-CIO, files this brief as *amicus curiae* in support of the Respondent, Maria A. Gregory.

INTEREST OF THE *AMICUS CURIAE* [1]

The American Federation of Government Employees, AFL-CIO ("AFGE") is a labor organization which represents

[1] Pursuant to Rule 37(6) of the Court, AFGE avers that no counsel for a party in this case authored this brief in whole or in part, and no person or entity, other than AFGE, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

approximately 600,000 employees of the federal government. AFGE is the largest labor organization representing non-postal federal employees in nearly every major department and agency of the federal government. In its capacity as exclusive bargaining representative, AFGE negotiates collective bargaining agreements, presents grievances and administrative complaints, including those before the Merit Systems Protection Board ("MSPB" or "Board"), litigates in federal courts, and engages in legislative activity on behalf of the employees it represents.

The United States Court of Appeals for the Federal Circuit has held in *Gregory v. United States Postal Service*, 212 F.3d 1296, 1300 (Fed. Cir. 2000), that, in an adverse action appeal by a federal employee, the Board may not consider prior disciplinary actions that are the subject of ongoing proceedings challenging the merits of those actions. The court reasoned that the legitimacy of the reasonable penalty analysis conducted by the Board would be jeopardized by the consideration of unreliable evidence such as prior actions still pending review. *Id.*

Adverse actions against the federal non-postal employees whom AFGE represents are subject to the same statutory provisions as such actions involving postal employees. *See* 5 U.S.C. § 7511 *et seq.* and 39 U.S.C. § 1005(a)(1). The afore-referenced decision of the Federal Circuit, therefore, affects the adverse action and appeal rights of the hundreds of thousands of federal, non-postal employees represented by AFGE, both in administrative proceedings before the Board under 5 U.S.C. § 7513(d) and in grievance arbitrations pursuant to the Federal Labor-Management Relations Act, 5 U.S.C. § 7121(e). As Respondent argues, the Federal Circuit's decision provides the only workable solution for the management of Board cases. AFGE submits, in this brief, that the Federal Circuit's decision is also the only result that is consistent with the the standards and burden of proof

established by the Civil Service Reform Act of 1978 ("CSRA"), Pub.L. No. 95-454, 92 Stat. 1111 and due process protections afforded to federal employees.

Since the effective date of the CSRA, AFGE has actively protected the statutory rights of federal employees before agencies, the Board, the Federal Labor Relations Authority, arbitrators, and the courts. In this case, AFGE's concern is that the consideration of pending prior disciplinary actions under a clearly erroneous standard violates the CSRA and the due process rights of federal employees. Permitting the consideration of pending prior disciplinary actions so as to substantiate the severity of a subsequent disciplinary penalty also provides agencies with a potentially easy and unlawful means whereby a series of meritless charges against an employee may be used to justify a removal action. The Federal Circuit's decision rightfully prevents this type of abuse, while observing the evidentiary standards established by the CSRA and the due process protections afforded to federal employees.

AFGE is committed to the protection of the constitutional and statutory rights of federal employees, and to obtaining redress for federal employees where rights have been violated. Because the petitioned-from decision directly addressses such issues and would affect any adverse action taken against federal employees, AFGE has a direct and compelling interest in the outcome of this litigation.

STATEMENT OF THE CASE

Amicus adopts Respondent Maria A. Gregory's Statement of the Case.

SUMMARY OF ARGUMENT

The CSRA sets forth the procedures and evidentiary standards for federal employee appeals of adverse actions. Under the CSRA, an agency may remove an employee to

promote the efficiency of the service. 5 U.S.C. § 7513(a). However, if that action is challenged, the agency must prove its decision by a preponderance of the evidence. 5 U.S.C. § 7701(c)(1)(B). In certain cases, the agency relies upon prior disciplinary actions, that are the subject of pending proceedings, to justify a penalty or establish recidivism (as in this case). The Board created in *Bolling v. Dept. of the Air Force*, 9 M.S.P.R. 335 (1981), a three part test with a "clearly erroneous" standard to evaluate the bona fides of prior disciplinary actions which are pending review on appeal but are being used by an agency to support a subsequent disciplinary actions. The *Bolling* test, however, presents two problems.

First, the *Bolling* standard ignores the procedural protections and evidentiary standards established by Congress in the CSRA. *Bolling* impermissibly changes the standard of proof from "preponderance of the evidence" to "clearly erroneous."

The *Bolling* standard further contradicts the CSRA because it incorrectly places the burden of disproving the agency's actions on the employee. Under *Bolling*, the employee must prove to the Board that the prior actions taken by the agency against her were improper. This creates a situation where, if an employee is subjected to a quick series of progressive disciplinary actions culminating in a removal in which the prior actions play a significant role, as in this case, there may be several on-going grievances or other administrative appeals at the same time. If the removal is adjudicated first and in favor of the agency, then the agency may simply move to have the other pending prior disciplinary actions dismissed on the basis that the employee is no longer employed by the agency and, therefore, cannot be afforded the protections of the negotiated grievance system or CSRA. The employee, then, would be denied the opportunity provided by statute or collective bargaining agreement to contest the other dis-

ciplinary actions that the agency used to justify its decision to remove the employee.

Second, the *Bolling* "clearly erroneous" standard invites agency abuse. Contrary to Petitioner's assertion, the Federal Circuit's decision does not provide an incentive for employees to prolong grievance proceedings. Rather, it curtails agency abuse of the system created by *Bolling* wherein, as in the case at bar, in a relatively short period of time, the agency imposes a series of disciplinary actions, and then justifies the removal of the employee based upon those actions, however de minimus or frivolous, leaving the employee to prove that the agency's prior actions were "clearly erroneous." The potential ramifications of such a situation, especially on an employee's constitutional due process rights, are enormous, considering that the agency may subsequently move to have the pending prior disciplinary actions dismissed as moot because the employee has been removed.

The Federal Circuit's decision does not establish a strict rule prohibiting the consideration of prior disciplinary actions that are the subject of pending grievances. To the contrary, the decision is the only result which harmonizes statutory law, an employee's constitutional due process protections, and public policy.

AFGE submits that the Federal Circuit's decision properly requires agencies to prove, under the appropriate standard of proof, the alleged misconduct in prior disciplinary actions that are pending before considering those actions in imposing a penalty in a subsequent adverse action.

ARGUMENT

I. THE FEDERAL CIRCUIT'S RULING IS CONSISTENT WITH THE CIVIL SERVICE REFORM ACT AND THE DUE PROCESS PROTECTIONS PROVIDED TO FEDERAL EMPLOYEES.

Prior to the enactment of the CSRA, the federal civil service personnel management system was, according to then-President Carter, a "maze" that "tolerates poor performance" and "permits abuse of legitimate employee rights." H.R.Rep. No. 1403, 95th Cong., 2d Sess. 2 (1978), *reprinted in*, 1 House Comm. on Post Office and Civil Service, 96th Cong., 1st Sess., *Legislative History of the Civil Service Reform Act of 1978*, at 636, 639 (1979). The CSRA was crafted, as a result, to play a dual role in that it provides federal agencies with the means to more efficiently manage the discipline and removal of employees, while strengthening the protection of legitimate employee rights from abusive agency actions. *Cornelius v. Nutt*, 472 U.S. 648, 650-2 (1985). The CSRA also established the Board and provided it with the jurisdiction to enforce the procedural protections accorded to employees and to conduct hearings in adverse action appeals. *Id.*

Federal employees are entitled to certain statutory due process protections.[2] Under the CSRA, federal employees

[2] Federal employees also have a constitutionally protected property interest in continued employment. *Board of Regents v. Roth*, 408 U.S. 564 (1972). Prior to taking adverse action against an employee, an agency must provide due process. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985). The most basic process due is notice of the action proposed and an opportunity for a hearing. *Loudermill, 470 U.S.* at 542. This Court has previously recognized that the governmental interests of prompt removals of unsatisfactory employees and avoidance of administrative burdens do not outweigh the employee's due process interests.

must receive advance written notice of the agency's proposed discipline, a reasonable time to answer and produce evidence, representation, and a written decision from the agency with specific reasons for the action. 5 U.S.C. §§ 7503, 7513. In the case of removals, the employee is also entitled to an appeal to the Board. 5 U.S.C. §§ 7513(d), 7701. The due process protections also include requiring the agency to prove an adverse action by a preponderance of the evidence, 5 U.S.C. § 7701(c)(1)(B), and to establish for adverse actions that the agency action is "only for such cause as will promote the efficiency of the federal service." 5 U.S.C. § 7513(a).

In some adverse actions, including removals, the agency uses prior disciplinary actions as a significant or primary factor to determine the penalty in a subsequent disciplinary action. If an employee has challenged the prior disciplinary actions as they occurred, then the adjudication of those actions may still be pending when the agency takes a subsequent disciplinary action against the employee. The Board established in *Bolling v. Dept. of the Air Force*, 9 M.S.P.R. 335 (1981), a framework to consider prior disciplinary actions that are pending when adjudicating a subsequent adverse action.[3]

Under the *Bolling* framework, the Board administrative judge makes a preliminary determination of whether, in taking the prior disciplinary actions, the agency provided the employee with written notice of the action and an opportunity to challenge it, and whether the action was made a matter of record. *Bolling*, 9 M.S.P.R. at 340. If the agency observed these procedures and the employee timely challenged that

Loudermill, 470 U.S. at 542-545. The right to due process is, of course, constitutionally guaranteed.

[3] The Board has adjudicated many cases since *Bolling* that have applied its framework in considering pending prior disciplinary actions. *See e.g. Crawford v. Dept. of Justice*, 45 M.S.P.R. 234, n.1 (1990) (citing cases).

prior action, then the administrative judge defers to the agency's reliance on the prior actions in the subsequent discipline, and conducts a limited review which requires the employee to show that the prior action was clearly erroneous.[4] *Id.* If the agency has not provided these procedures to the employee, then the Board conducts a full, *de novo* review of the prior action.[5] The Board noted that this limited scope of review balanced agency and employee interests: the agency could not use clearly erroneous prior actions to justify a harsher penalty in a subsequent action, and the employee could not, "relitigate issues that either were, or could have been, thoroughly litigated previously." *Id.* The Board, however, contradicted the express statutory scheme of the CSRA in creating the *Bolling* framework.

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[4] The Board created the "clearly erroneous" standard by using the standard for judicial review of agency actions set forth by the Court in *Citizens to Protect Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971), to define the "unreasonable, arbitrary or capricious" standard in the former Federal Personnel Manual ("FPM"). *Bolling*, 9 M.S.P.R. at 339. AFGE submits that the Board's reliance on *Overton Park* was misplaced. *Overton Park* was determined in the specific context of the scope of judicial review of agency decisions established by the Administrative Procedures Act ("APA"), 5 U.S.C. § 706. However, the Board, as it has itself noted, is not a court. *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 298 (1981). The Board, when determining the correctness of an adverse action, should not be employing the judicial standards of review established for courts. This is especially true when Congress has directed by statute that the Board should use a particular evidentiary standard, in this case preponderance of the evidence. See *infra*. As the Board stated in *Douglas*, this limited standard of review would do little more than serve as a precursor to any subsequent review performed by an appellate court and ignore the specific standard of proof established by the CSRA. *Douglas*, 5 M.S.P.R. at 298.

[5] If an arbitrator or the Board sets aside the prior action after the Board has adjudicated a subsequent adverse action relying upon that action, Board regulations permit the re-opening of the decision and its reconsideration regarding whether the subsequent agency adverse action remains appropriate. 5 C.F.R. § 1201.118.

In this regard, the use of the *Bolling* "clearly erroneous" standard of review contradicts both the evidentiary standard of proof and the allocation of the burden of proof established by the CSRA. The procedural and substantive protections provided to federal employees by the CSRA place the burden of proof on the agency and define the requisite amount of proof. A plain language reading of the CSRA indicates that the Board, in reviewing the adverse action, sustains the agency's decision only if the *agency* demonstrates by a *preponderance of the evidence* that the employee actually committed the misconduct alleged and that the adverse action promotes the efficiency of the service. 5 U.S.C. §§ 7513(a), 7701(c)(1)(B); 5 C.F.R. §1201.556(a)(1)(ii); *Henry v. Dept. of the Navy*, 902 F.2d 949, 953-4 (Fed. Cir. 1990).[6] The Board regulations define "preponderance of the evidence" as "[t]he degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue." 5 C.F.R. § 1201.56. The agency carries this burden of proof on the merits of the appeal, while the employee carries the burden only with respect to jurisdictional and timeliness of the appeal issues, and affirmative defenses. *Id.*

The *Bolling* "clearly erroneous" test, however, ignores this express statutory "preponderance of the evidence" standard set forth by Congress in Section 7701(c)(1)(B). Instead of the agency proving the alleged misconduct in a pending prior action by a preponderance of the evidence, the Board simply reviews the agency action to determine whether it is clearly erroneous. This application of the clearly erroneous standard to pending prior disciplinary actions, not only contradicts the CSRA standard, it also reveals an inconsistency in the Board's reasoning in *Bolling*. The clearly erroneous standard

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[6] The CSRA requires a "substantial evidence" standard of proof for actions based on unacceptable performance or removal from the Senior Executive Service for failure to be recertified. 5 U.S.C. § 7701(c)(1)(A).

is premised on the reasoning that it would prevent employees from relitigating issues. *Bolling*, 9 M.S.P.R. at 340. If that reasoning is correct, then a prior disciplinary action is not "thoroughly litigated previously" if the action continues to be the subject of pending proceedings.

In other words, unless the employee has been provided the full review of the prior disciplinary actions—due process—that she is entitled to, the agency should not consider those prior actions in a subsequent adverse action. For example, in the case at hand, although the first action taken against Ms. Gregory was reversed by an arbitrator, the remaining two actions were never adjudicated. Ms. Gregory, therefore, never "thoroughly litigated" two of the three prior disciplinary actions. Thus, she never received the procedural protections to which she is entitled. At the least, if the *Bolling* framework is correct, then, the Board should have conducted a *de novo* review of those prior actions and required the agency to prove by preponderant evidence whether the prior alleged misconduct occurred and, if so, the reasonableness of the penalty. The importance of a *de novo* review of pending prior actions is compounded when the agency, as it did in this case, contends that the employee is a recidivist and points to the unreviewed prior discipline as its basis for the subsequent adverse action.[7]

Second, the "clearly erroneous" test also impermissibly shifts the burden of refuting the agency's action onto the employee. Under *Bolling*, the employee carries the burden of proof because the Board will discount an agency *action* only if it is clearly erroneous. *Bolling*, 9 M.S.P.R. at 340. The employee, therefore, is placed in the situation of having to

[7] In this respect, Petitioner's gross mischaracterization of Respondent as a "recidivist" based on the three prior disciplinary actions is highly questionable as Petitioner failed to prove the alleged misconduct in the first action and hearings on the legitimacy of the second and third actions were never held.

discredit prior agency discipline, all the while subject to the higher "clearly erroneous" standard. The shift from agency to employee, and "preponderance of the evidence" to "clearly erroneous" eviscerates the fundamental protections statutorily mandated for employees by the CSRA. Instead of the employee being considered innocent of the alleged misconduct until the agency proves otherwise by preponderant evidence, the agency action is presumed to be valid, unless the employee shows it to be clearly erroneous.[8]

The clearly erroneous standard in *Bolling* and its genesis from the arbitrary/capricious standard set forth in the APA and *Overton Park* should be distinguished from the *Douglas* ruling, under which the Board determines whether an agency-selected *penalty* is arbitrary or capricious. Under *Douglas*, the burden of actually proving the offense by preponderant evidence remains upon the agency, in accordance with Section 7701(c)(1)(B). *Douglas*, 5 M.S.P.R. at 299-303.

In *Bolling*, the Board stated that the "clearly erroneous" standard would apply to the actual *action* in personnel appeals. *Bolling*, 9 M.S.P.R. at 340. Thus, instead of the agency proving its prior actions by a preponderance of the evidence, as required by Section 7701(c)(1)(B), the Board determines whether the prior *actions* were "clearly erroneous." *See e.g., Ballew v. Dept. of Army*, 36 M.S.P.R. 400 (1998); *Rewald v. U.S. Postal Service*, 34 M.S.P.R. 13 (1987); *Hubbard v. U.S. Postal Service*, 32 M.S.P.R. 505 (1987); *Freeman v. Dept. of Transp., F.A.A.*, 20 M.S.P.R. 290 (1984). *Bolling* should be distinguished from *Douglas* because the Board, in *Douglas*, did not change or shift the burden of proof for proving the *action*.

[8] Rare is the occasion when the Board has actually found a prior disciplinary action to be clearly erroneous. *See e.g., Eichner v. U.S. Postal Service*, 83 M.S.P.R. 202, 210 (1999).

Congressional intent to place the burden of proof on the agency in federal personnel actions is plainly evident in the language of the CSRA. 5 U.S.C. § 7701(c)(1)(B). *Bolling* contravenes that express language and intent by reaching a result that is contrary to the express provisions of the CSRA and the protections provided to employees under it.[9] In *Gregory*, the Federal Circuit correctly required the Board, in accordance with the CSRA, to sustain agency disciplinary actions only on the basis of actions established by a preponderance of the evidence before the Board, rather than actions the bona fides of which are pending review elsewhere.[10]

II. THE CONSIDERATION OF PRIOR DISCIPLINARY ACTIONS THAT ARE PENDING INVITES ABUSIVE ADVERSE ACTIONS.

The consideration of prior disciplinary actions that are the subject of pending proceedings not only offends an

[9] The Board should not be accorded any deference to its interpretations in *Bolling* as there is no ambiguity in the plain language of the CSRA; Congress has directly spoken on the issue of which party carries the burden of proof as to proving the alleged misconduct in federal employee appeals, and the appropriate standard of proof in such appeals. *See, Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-846 (1984).

[10] The Federal Circuit remanded this portion of the Board's decision for abuse of discretion. *Gregory*, 212 F.3d at 1300. The Federal Circuit may reverse Board decisions that are arbitrary, capricious, an abuse of discretion, not in accordance with law, in violation of required procedures, or unsupported by substantial evidence. 5 U.S.C. § 7703(c). In addition, the Court may take judicial notice of a fact that is not subject to reasonable dispute and capable of accurate and ready determination. The Court may also take judicial notice of proceedings in other forums, especially if involving the same parties. *See e.g., Genentech Inc. v. U.S. Intern. Trade Com'n*, 122 F.3d 1409 (Fed. Cir. 1997). AFGE submits that it is certainly well within the Federal Circuit's authority to take judicial notice of the arbitration decision in the first disciplinary action and remand the case to the Board. *Gregory*, 212 F.3d at 1299.

employee's due process rights, but also invites abusive adverse actions from an agency. For example, an agency can freely subject an employee to a series of minor, but progressive disciplinary actions immediately prior to her removal in order to support the assessment of that removal action. The agency's actions would be protected by the Board's *Bolling* rule, under which prior disciplinary actions receive only a cursory review under a very limited clearly erroneous standard; at the removal hearing, the agency would not carry the burden of proving by a preponderance of the evidence the occurrence of the prior alleged misconduct. *See* supra. After the removal, the agency could move to have any pending prior disciplinary actions dismissed as the employee could no longer receive the protections of the CSRA or collective bargaining agreement due to the removal.[11] Such potential for abuse offends due process and the intent of the CSRA to create a system with specific procedures and evidentiary standards to protect employees from baseless agency actions.

Petitioner ignores this legitimate concern and the violation of fundamental due process rights, however, and instead attempts to paint a nightmarish scenario of employees delaying a removal by grieving prior disciplinary actions. Pet. at 35. Towards this end, Petitioner cites to common provisions in collective bargaining agreements, which rightfully prevent an agency from considering prior discipline that is stale. Petitioner claims that these provisions, in conjunction with the *Gregory* rule preventing the consideration of pending prior disciplinary actions, would prevent an agency from ever considering prior discipline. Pet. at 35-36. These concerns, however, are not supported by *Gregory* and are, in any event, outweighed by the legitimate due process rights of an employee.

[11] There is some indication from the Respondent that this has already occurred in her case. *See* Opp. Cert. at 12.

The Federal Circuit recently commented on the scope of the *Gregory* rule in *Blank v. Dept. of the Army*, 247 F.3d 1225 (Fed. Cir. 2001). The court declined to extend the *Gregory* rule in cases involving complaints of discrimination filed with the Equal Employment Opportunity Commission ("EEOC"). The court did not extend *Gregory* to EEOC complaints because EEOC appeals often take years to resolve, unlike arbitrations or Board proceedings. *Blank*, 247 F.3d at 1230. The Federal Circuit recognized that the CSRA was partly enacted "to give agencies greater ability to remove or discipline expeditiously." *Blank*, 247 F.3d at 1230, *citing*, *Cornelius v. Nutt*, 472 U.S. 648, 662 (1985). The court noted that due to the often-lengthy EEOC process, an agency would be "effectively prohibited from relying on prior disciplinary actions." *Blank*, 247 F.3d at 1230.

Blank indicates that lengthy EEOC proceedings (to which the *Gregory* rule would not apply) should be distinguished from the arbitration and Board proceedings at issue in *Gregory*. Collective bargaining agreements generally require arbitrations to be resolved expeditiously. In the case of the National Association of Letter Carriers, the collective bargaining agreement provides for the possibility of expedited arbitration for disciplinary cases of 14 days suspension or less which do not involve contract interpretation or for any other cases that the parties may mutually determine. Agreement Article 15.4.C. A decision is rendered in less than one week. *Id.* The contract also requires expeditious scheduling of cases which involve removals or suspensions for more than 14 days. *Id.* at 15.4.B. Additionally, the Board's internal guidelines mandate that appeals be resolved within 120 days. MSPB Administrative Judges' Handbook, Chapter 1, Section 2.[12] In this case, Respondent's prior

[12] The Handbook notes, in pertinent part, "The Board's policy is to adjudicate all appeals within 120 days of receipt by the regional office (RO) except for good cause shown."

disciplinary actions most likely would have been adjudicated if the Petitioner had not sought to delay them. *See* Opp. Cert. at 19, n. 12. The potential for delays in prior actions caused by an employee in order to forestall a subsequent removal is not implicated by the facts in this case, the negotiated arbitration provisions in the collective bargaining agreement, or the Board's internal guidelines.

In sum, the *Gregory* rule challenges the *Bolling* framework under which an agency can freely subject an employee to an adverse action without affording that employee due process for any pending prior disciplinary actions that were used as a significant factor in determining the subsequent action. Moreover, *Gregory* also correctly discredits the *Bolling* clearly erroneous standard for reviewing pending prior actions where a decision has not been issued by the trier of fact. The CSRA specifically requires an agency to prove the alleged misconduct by a preponderance of the evidence; the clearly erroneous standard directly contradicts that standard. Legitimate employee rights are harmed by decisions such as *Bolling* and directly contradict Congress' intent to protect employee rights through the procedural protections of statutes such as the CSRA.

CONCLUSION

Based upon the foregoing reasons, *Amicus* American Federation of Government Employees, AFL-CIO, respectfully requests that the Court affirm the decision of the United States Court of Appeals for the Federal Circuit.

Respectfully submitted,

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